Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Thomas P. O'Neill, Jr.
The Speaker
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

After careful review of H.R. 1524 and its companion bill in the Senate, S. 1815, the Department of Justice has concluded that enactment of this legislation, even with the changes previously suggested by the Administration, would usurp private-sector decisionmaking and violate core principles of federalism. Therefore, the Department urges the House to reject H.R. 1524 when it is brought to the floor for a vote.

We know of no compelling reason why the federal government, or any level of government, should preclude private employers from using polygraphs. This Administration firmly believes that the terms and conditions of private employment, to the maximum extent possible, should be decided in the private marketplace. Government should not challenge an employer's judgments on the credibility of employees or prospective employees, however determined, absent some proof of impermissible discrimination. Even H.R. 1524, by its exemptions for drug theft or diversion, recognizes that polygraphs serve a useful purpose for some employers.

Moreover, important principles of federalism mandate that we do not intervene in matters that have traditionally been the responsibility of the states, and in which there is no overriding need for national policy uniformity. On the contrary, given that the scientific and legal boundaries of the polygraph issue are in a state of flux, it appears to be an appropriate area in which to allow the states to experiment with their own approach to any perceived problems. Nearly half the states have enacted laws regulating polygraphs, thus demonstrating the clear ability of states to handle this issue. Moreover, polygraph use is well outside of the traditional bounds of controversies related to terms and conditions of employment, an area largely preempted by the federal government.

Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6

Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6

Although referred to as a 'lie detector,' the polygraph itself does not detect lies. The polygraph is an instrument that measures a variety of physiological responses of an individual undergoing questioning. These measurements assist an examiner in forming an opinion as to whether the individual has given truthful or deceptive answers to particular questions.

Numerous scientific studies have attempted to quantify the accuracy of polygraph examinations. Because there are differences in the skills of particular polygraph examiners, and in the types of inquiries they are asked to undertake, the results of the studies have varied. The overwhelming majority of studies, however, show accuracy rates for polygraph examinations within the range of 70 to 95 percent. These results reflect a clear scientific consensus that the polygraph can produce statistically significant indications of deception and non-deception. In fact, the polygraph has long been used to good effect as an investigative tool by the federal government. Consequently, the Justice Department has traditionally supported the use of the polygraph as an adjunct to the normal interview and interrogation process in certain kinds of matters within its investigative jurisdiction.

> . . .with proper ethics by the polygraph examiner and tight administrative control by the user agency, there is no question but that the polygraph can be a valuable investigative aid to supplement interrogation in selected criminal and national security cases. Interrogation is a basic tool of any investigative agency and the FBI considers the polygraph technique a thorough and specialized interview procedure in which a skillful interrogator is attempting to simply ascertain the truthful facts from a consenting individual regarding a matter in which we have jurisdiction.
>
> In some instances suspects will admit deception and furnish confession and or signed statements. In most instances valuable new information or investigative or investigative direction is developed as a result of the examination and followup interrogation._/

The Justice Department, however, has opposed the use of polygraph examination results in criminal trials as evidence of guilt or innocence for several reasons. First, a defendant could seek out "friendly" examiners, taking several tests until he

---

_/ Statement of Bell P. Herndon, Supervisory Special Agent, FBI. The Use of Polygraphs and Similar Devices by Federal Agencies, Hearings Before the House Committee on Government Operations, 93rd Cong., 2d Sess. (1974) at p. 419.

Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6

Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6

passed one and then seek to use that favorable result as evidence of innocence. Because of Fifth Amendment considerations, the prosecutor could not obtain the other examinations without the consent of the accused. Second, there is a substantial likelihood that the jury would give undue weight to polygraph results, ultimately displacing its own role as trier of guilt or innocence. Finally, attempts to introduce polygraph evidence could greatly increase the length of criminal trials in order to accommodate the necessary expert testimony. None of these considerations apply when the polygraph is used as a screening or investigative tool.

Polygraph misuse may be more appropriately deterred by restricting the conditions under which polygraphs are administered rather than prohibiting their use altogether. The states are better equipped to make those determinations. For example, Wisconsin provides procedures for the appeal of allegedly unfair testing and carefully controls the disclosure of results. Other states prohibit examiners from asking certain classes of questions, such as those dealing with political beliefs or sexual practices. Finally, many states require that polygraphs be administered only by licensed examiners.

Because the polygraph can frequently provide accurate information about a person's veracity, the federal government should not prohibit its use by non-government employers. Again, rather than a flat nationwide ban on polygraph use, the uses of, and safeguards surrounding, polygraph use should be resolved on a case-by-case, state-by-state basis to permit maximum flexibility. There are a wide variety of private-sector jobs that may require employers to take appropriate security precautions to insure against theft or industrial espionage. Certainly, stringent security precautions may be necessary for employees who work in jobs affecting public health and safety, e.g., technicians at nuclear power plants, airline pilots or those who work with narcotics and dangerous drugs. Moreover, we should not be indifferent to the plight of other employers, such as retailers who want to take prudent steps to ensure that their inventory does not disappear at the hands of their own employees.

Given the benefits of polygraph use and the ability of the states to protect adequately against any polygraph misuse, a nationwide ban on polygraph use is inappropriate. Consequently, the Justice Department opposes H.R. 1524.

Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6

Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6

The Office of Management and Budget advises us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John R. Bolton
Assistant Attorney General

cc. Honorable Orrin G Hatch
United States Senator

Approved For Release 2011/09/08 : CIA-RDP87B00858R000500810051-6